The American Jury: Handicapped in the Pursuit of Justice

SAUL M. KASSIN*

Whether it is true or not, the story is a favorite among students of trial advocacy: Clarence Darrow, smoking a cigar during the presentation of his opponent's case, stole the jury's attention by inserting a thin wire into the cigar and producing an ash that grew like magic with every puff.[1] In a more recent case involving personal injury in which the plaintiff had lost a leg, Melvin Belli carried into court a large L-shaped package wrapped in yellow butcher paper and tied with a white string, and placed it on counsel's table as a visible reminder. Then during his closing argument, Belli unwrapped the package, only to reveal a prosthesis.[2] These courtroom pranks as well as other, more common trial practices, are clever, entertaining, and perhaps even effective. But at what cost to the jury's pursuit of justice?

This Article examines nonevidentiary social influences on the jury, influences that emanate from various trial practices and threaten to compromise a litigant's right to a fair trial. Broadly defined, there are two phases in the jury's decision-making task that are at risk. The first is the factfinding competence of *individual jurors*—that is, their ability to make accurate judgments of the evidence (*e.g.*, by distinguishing among witnesses of varying credibility), and disregard information that is not in evidence (*e.g.*, material received from the news media, voir dire questions, opening statements, closing arguments, and inadmissible testimony). The second phase of a jury's task is the deliberation of the *jury as a group*—that is, the process by which individual members contribute independently and equally to a joint outcome, exerting influence over each other through information and rational argument rather than heavy-handed social pressure.[3]

The following evaluation of juries is based on the results of controlled behavioral research, not on abstract legal theory, isolated case studies, or trial anecdotes. The reader should thus be mindful of both the strengths and weaknesses inherent in this approach. The most appropriate way to obtain a full and rich understanding of how juries function is to observe the decision-making process in action. Juries, however, deliberate in complete privacy, behind closed doors. Unable to observe or record actual jury deliberations, researchers have had to develop alternative, less direct strategies (*e.g.*, analysis of court records in search of statistical relationships between various trial factors and jury verdicts; post-trial interviews with jurors, alternates, and other trial participants;

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* Associate Professor of Psychology, Williams College; Ph.D., University of Connecticut 1978; B.S., Brooklyn College 1974.

1. McElhaney, *Dealing with Dirty Tricks*, 7 LITIGATION 45, 46 (1981).

2. M. BELLI, MELVIN BELLI: MY LIFE ON TRIAL 107-09 (1976).

3. Allen v. United States, 164 U.S. 492, 501 (1986).

jury simulation experiments). Most of the research reported in this paper was conducted within a mock jury paradigm.[4]

I. FACTFINDING COMPETENCE OF INDIVIDUAL JURORS

As individual factfinders, jurors must competently process all evidence and instructions, disregard information that is not in evidence, and reconstruct disputed events by distinguishing among witnesses of varying credibility. We will see that the task is difficult, and that it is complicated even further by various questionable practices.

A. *Jurors as Arbiters of Truth and Deception*

Confronted with opposing sides and inevitably conflicting testimony, jurors must accept the testimony of some witnesses, and reject others. Toward this end, the courts instruct jurors to pay close attention not only to the content of the witness's testimony but to his or her demeanor while testifying. Indeed, many judges prohibit jurors from taking notes for fear that they will overlook informative nonverbal cues.[5]

Unfortunately, psychological research suggests that people perform at only slightly better than chance levels in evaluating truth and deception. Even individuals who make these judgments for a living (*e.g.*, customs inspectors, law enforcement officers) are prone to error.[6] Based on a review of over thirty studies, Miron Zuckerman and others conclude that there is a mismatch between the nonverbal behaviors actually associated with deception and those cues used by perceivers.[7] People tend to focus on a speaker's face, for example, even

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4. The mock jury paradigm involves simulating trials in the form of transcripts, audiotapes, or videotapes, and recruiting subjects to act as jurors. This method has two advantages. First, it enables researchers to secure control over events that take place in the "courtroom" and design controlled experiments that can establish causal relationships between specific trial characteristics and jury verdicts. Second, it offers a good deal of flexibility, enabling researchers to manipulate variables that cannot be touched in real cases (*e.g.*, evidence, arguments, trial procedures, judge's instructions, the composition of the jury) and obtain measures of behavior that are otherwise too intrusive (*e.g.*, mid-trial opinions; attention, comprehension, and recall; physiological arousal; videotaped deliberations). In short, trial simulations enable us to observe not only the outcome but the process of jury decision-making. A more extensive discussion of this technique appears in Bray & Kerr, *Methodological Considerations in the Study of the Psychology of the Courtroom*, THE PSYCHOLOGY OF THE COURTROOM 287, 296-98 (1982). For a description of practical applications, see Kassin, *Mock Jury Trials*, 7 TRIAL DIPL. J. 26 (1984).

As with other indirect methods of inquiry, the mock jury paradigm is not without its shortcomings. In exchange for a highly controlled environment, the approach suffers from the problem of external validity (*i.e.* generalizability to real trials). As a general rule, generalizability is enhanced by research conditions that approximate the real event. Still, legitimate empirical questions can be raised. For more detailed critiques, see Dillehay & Nietzel, *Constructing a Science of Jury Behavior*, REVIEW OF PERSONALITY AND SOCIAL PSYCHOLOGY 246 (1980); Ebbesen & Konecni, *On the External Validity of Decision-Making Research: What do we Know about Decisions in the Real World?*, COGNITIVE PROCESSES IN CHOICE AND DECISION BEHAVIOR (1980).

5. For a review of arguments against notetaking, see S. KASSIN & L. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 128 (1988).

6. DePaulo & Pfeifer, *On-the-Job Experience and Skill at Detecting Deception*, 16 J. APPLIED SOC. PSYCHOLOGY 249, 261-62 (1986); Kraut & Poe, *Behavioral Roots of Person Perception: The Deception Judgments of Customs Inspectors and Laymen*, 39 J. PERSONALITY & SOC. PSYCHOLOGY 784, 788 (1980).

7. Zuckerman, DePaulo & Rosenthal, *Verbal and Nonverbal Communication of Deception*, 14 ADVANCES IN EXPERIMENTAL SOC. PSYCHOLOGY 1, 38-40 (1981).

though facial expressions are under conscious deceptive control.[8] At the same time, there is a tendency to overlook kinesic and paralinguistic cues, even though they are more revealing.[9] In short, there is reason to believe that jurors tune into the wrong channels of communication. Seduced by the silver tongue and the smiling face, they may fail to notice the restless body and the quivering voice.[10]

Human imperfections aside, the rules of evidence and trial procedure that guide the questioning of witnesses are intended to facilitate the jury's quest for the truth.[11] In theory, direct and cross examination should thus enhance the credibility of witnesses who are accurate and honest, while diminishing the credibility of those who are inaccurate or dishonest—in other words, it should heighten the jury's factfinding competence. There is no way to know how frequently the law's objectives are actually achieved. While much is written about effective questioning techniques, surprisingly little research has examined their prevalence or their impact on the jury.[12] One problem, however, seems evident. Even though trial attorneys are expected to adhere to rules of evidence and keep their trial strategies within the boundaries of ethical conduct,[13] they often bend the rules and stretch the boundaries.[14] Thus we ask, to what extent can the examination of witnesses be used to subvert a jury's quest for the truth?

There are several ethically questionable trial practices, or "dirty tricks," that could make it difficult for jurors to make sound credibility judgments. Coaching witnesses, leading their testimony in court, distracting the jury at critical moments in an opponent's case, making frivolous objections, and asking questions that invite the leakage of inadmissible evidence, are among the possibilities.[15] In this section, two such practices are evaluated: the presentation of deposition testimony, and the use of presumptuous cross-examination questions.

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8. Deceivers often wear false smiles to mask their real feelings; see Ekman, Friesen & O'Sullivan, *Smiles when Lying*, 54 J. PERSONALITY & SOC. PSYCHOLOGY 414, 415 (1988).

9. Deception is often accompanied by fidgety movements of the hands and feet, and restless shifts in posture. When people lie, especially when they are highly motivated to do so, there is also a rise in their voice pitch and an increased number of speech hesitations. *See* DePaulo, Lanier & Davis, *Detecting the Deceit of the Motivated Liar*, 45 J. PERSONALITY & SOC. PSYCHOLOGY 1096, 1096 (1983); *see also*, Streeter, Krauss, Geller, Olson & Apple, *Pitch Changes During Attempted Deception*, 35 J. PERSONALITY & SOC. PSYCHOLOGY 345, 348-49 (1977).

10. People sometimes become more accurate in their judgments of truth and deception when they are too busy to attend closely to what a speaker says. *See* Gilbert & Krull, *Seeing Less and Knowing More: The Benefits of Perceptual Ignorance*, 54 J. PERSONALITY & SOC. PSYCHOLOGY 193, 201 (1988). Although distracting jurors from the content of a witness's testimony is a ludicrous idea, it is possible that credibility judgments would be improved by a more specific demeanor instruction, one that redirects attention toward cues that are more diagnostic than facial expressions. Research suggests, for example, that when people are encouraged to pay more attention to the voice than to the face, they make more accurate judgments of truth and deception. *See* DePaulo, Lassiter & Stone, *Attentional Determinants of Success at Detecting Deception and Truth*, 8 PERSONALITY & SOC. PSYCHOLOGY BULL. 273, 277 (1982). Liars are also betrayed by movements of the lower body, so jurors could be instructed to consider these cues as well. Ironically, however, the witness's body is often hidden from view—by the witness stand.

11. E. CLEARY, MCCORMICK ON EVIDENCE § 5 (2d ed. 1972).

12. For a review of this literature, see Loftus & Goodman, *Questioning Witnesses*, THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROC. 253 (1985).

13. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 (1983).

14. *See generally* R. UNDERWOOD & W. FORTUNE, TRIAL ETHICS (1988); Underwood, *Adversary Ethics: More Dirty Tricks*, 6 AM. J. TRIAL ADVOC. 265 (1982).

15. McElhaney, *supra* note 1, at 45-48; Underwood, *supra* note 14, at 269-89.

B. *Deposition Testimony and the Surrogate Witness*

As difficult as it is to evaluate witnesses by their demeanor, the task is needlessly complicated when jurors must make judgments of credibility without ever seeing the actual witness. Often, people who are scheduled to testify are not available to appear in court.[16] In order to secure the substance of what these prospective witnesses have to say, counsel may take a deposition and enter that deposition into the trial record.

The use of deposition testimony in lieu of the live witness raises an interesting procedural question: How is such testimony entered into the trial record? How is the information presented, and what effect does it have on the jury's ability to evaluate the witness? In most courts, depositions are transcribed and then read aloud from the witness stand by a clerk or by an individual appointed by the witness's attorney. Usually, the clerk reads the answers, while the attorney reads the questions; sometimes, the attorney reads the entire script.

As one might expect, the practice of using what I call "surrogate witnesses" in an adversarial context paves the way for abuse. In one case, for example, I observed pretrial auditions of more than thirty professional actors and actresses who were called to play the roles of various absent witnesses who had been deposed. The actors all read the transcripts flawlessly. What distinguished those who were hired from those who were not was their ability to project through subtle nonverbal behaviors—crossing legs, rolling eyes, smiling, or sighing at a critical moment—specific impressions of the witnesses they were supposed to represent.[17]

It should not be permissible to use surrogates in this manner. Indeed, deposition readers should not unduly emphasize any words or engage in suggestive conduct. Nevertheless, many litigators appreciate the potential for gain in this procedure. For example, one trial advocate advises that "whoever is playing the part of the witness on the stand will, most assuredly, be identified with that witness. True, he is nothing more than an actor, but human beings tend to associate a voice with a person; so be certain that the 'actor' projects a favourable image."[18] It is even suggested that when faced with a witness with undesirable characteristics, the "imaginative" lawyer should consider taking a deposition and then replacing that witness with an attractive surrogate.[19] Research on the social psychology of persuasion offers little guidance. It is clear that audiences are influenced by the *source* of a communication,[20] but do characteristics of the *messenger* have the same effect? Is it truly possible to alter the impact of a deposition and mislead the jury by manipulating the surrogate's demeanor?

16. The death of a prospective witness is an obvious problem. Those who live beyond a certain distance from the courthouse, or who are sick, handicapped, out of the country, or in prison, may also be excused. *See* FED. R. CIV. P. 32(a)(3).

17. *See generally*, Kassin, *supra* note 4, at 27.

18. A. MORRILL, TRIAL DIPLOMACY 52 (1972). Conversely, it is advisable to present the testimony of witnesses who are "singularly impressive" live rather than via deposition. *See* R. KEETON, TRIAL TACTICS AND METHODS 18 (1973).

19. A. MORRILL, *supra* note 18, at 52.

20. For a recent review of this literature see R. PETTY & J. CACIOPPO, COMMUNICATION AND PERSUASION 204-09 (1986).

To test this hypothesis, I conducted the following mock jury experiment.[21] Eighty-eight subjects read a summary of a case in which the plaintiff sought damages from a security company because he had been harassed and then shot by one of its guards. The defense claimed the plaintiff was drunk and had inadvertently shot himself in a scuffle with their guard. There were no eyewitnesses to the shooting, and the physical evidence was ambiguous. For all practical purposes, a jury's verdict would thus hinge on the relative credibility of opposing witnesses, the plaintiff and the guard. After reading a summary of the case, subjects watched a carefully staged videotape of the plaintiff's testimony. An actor was hired to play this critical witness in two contrasting roles. In one tape, he was attentive, polite, cooperative, and unhesitating in his response to questions; in the other, he read the same testimony, but was impolite, often annoyed, cautious and fumbling in his style. The actor read exactly the same transcript in both conditions, varying only his tone of voice, facial expressions, and body language.

Since a witness's demeanor is considered relevant, one would expect that even though subjects heard the same testimony read by the same actor, those who viewed the positive-demeanor witness would prove more favorable to the plaintiff than those who viewed the negative-demeanor witness. This expectation was confirmed. Subjects rated the positive witness as more likeable, sincere, and trustworthy, and his testimony as more believable, accurate, and persuasive. Seventy-two percent of those in the positive-demeanor group voted for the plaintiff, compared to only twenty-two percent in the negative-demeanor group. But what if subjects were told—both before and after watching the tape—that they were not seeing the actual witness, but an individual assigned to read the witness's deposition? Since the demeanor of a surrogate is not relevant to judging the credibility of a witness, and since the two tapes were identical in verbal content, jurors should not be affected by what they saw. But they were. Even though subjects were aware that they were merely watching a clerk reading from a transcript, those who watched the positive- rather than negative-demeanor tape rated the witness and the testimony itself as more credible, and were more likely to return a verdict for the plaintiff—sixty-one percent to thirty-three percent.

As noted earlier, deposition readers are not supposed to embellish their performances. But can judges necessarily detect the subtle nuances and manipulations of a professional actor? People are often not conscious of the nonverbal cues that guide their impressions. Moreover, what about *nonbehavioral* sources of bias such as the deposition reader's physical appearance? Persuasion researchers have found that communicators who are attractive elicit a greater change in attitudes and behavior than those who are not.[22] To examine whether jurors are likewise influenced by the physical appearance of a surrogate, I con-

21. Kassin, *Deposition Testimony and the Surrogate Witness: Evidence for a "Messenger Effect" in Persuasion*, 9 PERSONALITY & SOC. PSYCHOLOGY BULL. 281, 283-84 (1983).

22. *E.g.*, Chaiken, *Communicator Physical Attractiveness and Persuasion*, 37 J. PERSONALITY & SOC. PSYCHOLOGY 1387, 1395 (1979); *see also* Pallak, *Salience of a Communicator's Physical Attractiveness and Persuasion: A Heuristic versus Systematic Processing Interpretation*, 2 SOC. COGNITION 158, 168 (1983).

ducted an experiment similar to the one just described.[23] Mock jurors read about a criminal conspiracy case, and then listened to an audiotape of the testimony of a female witness accompanied by a series of slides taken in a courtroom. All subjects heard the same tape, but viewed slides of either an attractive or unattractive woman who was believed to be either the witness or a deposition reader.[24] Paralleling the results of the first study, perceptions of the witness's credibility were affected not only by the physical attractiveness of the witness, but by the surrogate's appearance as well.

Taken together, these studies suggest that jurors may be unable to separate a witness and his or her testimony from the messenger who delivers it. Thus, it seems that jurors—despite their best efforts to make sound credibility judgments—may be seriously misled by the behavior and appearance of those who read depositions. The solution to this problem is clear, and easily implemented: videotaped depositions. Since the opportunity for mischief is inherent in the mere substitution of one individual for another, videotape should be used to preserve the witness's demeanor for the record without introducing additional extraneous information. Jurors would then watch these tapes on a monitor stationed in the courtroom.[25]

C. *Presumptuous Cross-Examination Questions and the Power of Conjecture*

The opportunity to confront opposing witnesses through cross-examination is an essential device for safeguarding the accuracy and completeness of testimonial evidence. What impact does cross-examination have on the jury's ability to reconstruct the truth about an event? What are the dangers? Ideally, cross-examination should enhance a jury's factfinding competence by increasing the credibility of witnesses who are accurate and honest relative to those who are not. To be sure, cross-examination is an indispensable device. Many a mistaken and deceptive witness has no doubt fallen from the stand, exposed, scarred, and discredited from the battle of cross-examination. But cross-examination can also be used to exert an influence over the jury in a way that subverts its quest for truth.

Asking questions provides more than simply a mechanism for eliciting answers. Leading questions in particular may impart information to a listener through imagery, implication, and conjecture.[26] Carefully chosen words can obscure and even alter people's impressions, as when tax increases are called "revenue enhancements," and the strategic defense initiative is referred to as "star wars." Consider the following exchange between an attorney and the defendant in an illegal abortion case:

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23. Kassin, Deposition Testimony and the Surrogate Witness: Further Evidence for a "Messenger Effect" in Persuasion, Unpublished data (1990).

24. Attractiveness was determined through pretesting.

25. *See, e.g.*, McCrystal, *Videotape Trials: Relief for Our Congested Courts*, 49 DEN. U.L. REV. 463, 465-66 (1973); *see also* Kornblum, *Videotape in Civil Cases*, 24 HASTINGS L.J. 9, 23-26 (1972).

26. *See* Conley, O'Barr & Lind, *The Power of Language: Presentational Style in the Courtroom*, 6 DUKE L.J. 1375, 1386-89 (1978).

Q: You didn't tell us, Doctor, whether you determined that the *baby* was alive or dead, did you Doctor?

A: The *fetus* had no signs of life.[27]

In this example, the witness resisted the lawyer's imagery. Often, however, answers can be shaped by how a question is worded. In a classic experiment on eyewitness testimony, for example, Elizabeth Loftus and John Palmer had subjects watch films of an automobile collision. Those who were subsequently asked, "About how fast were the cars going when they *smashed* into each other?" estimated an average speed of forty-one miles per hour; those who were asked "About how fast were the cars going when they *hit* each other?" estimated an average of only thirty-four mph.[28] In fact, the wording of this critical question had a lasting effect on subjects' memories of the event. When asked one week later whether they could recall broken glass at the scene of the accident (there was none), only fourteen percent of those previously asked the hit question said they did, compared to thirty-two percent of those who had been asked the smash question. Once the seed of misinformation was planted, it took on a life of its own.

Even when a question does not mislead its respondent, it may still mislead the jury. When a question implies something that is never explicitly stated, for example, the listener may confuse what is said with what is only implied. Cognitive studies of pragmatic implications reveal that such confusion is common. In one study, mock jurors listened to an excerpt of testimony and indicated whether certain statements were true or false. After hearing the statement, "I ran up to the burglar alarm," for example, most subjects recalled that the witness had said, "I *rang* the burglar alarm." Apparently, people process information between the lines and assume they heard what was only implied.[29]

Due to the nearly unrestricted use of leading questions, cross-examination provides additional opportunity to influence jurors through questions that are designed to impart misleading information to the jury. In *Trial Ethics*, Underwood and Fortune note that "one of the most common abuses of cross-examination takes the form of a question implying a serious charge against the witness, for which counsel has little or no proof. All too often, trial attorneys ask such questions for the sole purpose of wafting unwarranted innuendo into the jury box."[30] When lawyers ask questions that suggest their own answers, are jurors influenced by the information implied by those questions? Is cross-examination by innuendo an effective device?

Research in non-legal settings tentatively suggests an affirmative answer. For example, William Swann and his colleagues examined the effects of hearing

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27. Danet, *'Baby' or 'fetus'?: Language and the Construction of Reality in a Manslaughter Trial*, 32 SEMIOTICA 187, 206 (1980).

28. When other verbs were substituted for these, estimates varied considerably, *e.g.*, "collided" yielded 39 mph; "contacted" yielded 32 mph. *See* Loftus & Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585, 586 (1974).

29. *See* Harris & Monaco, *Psychology of Pragmatic Implication: Information Processing Between the Lines*, 107 J. EXPERIMENTAL PSYCHOLOGY: GENERAL 1, 6-9 (1978); *see also* Johnson, Bransford, & Solomon, *Memory for Tacit Implications of Sentences*, 98 J. EXPERIMENTAL PSYCHOLOGY 203 (1973).

30. R. UNDERWOOD & W. FORTUNE, *supra* note 14, at 346.

an interview in which the questioner implies that the respondent has certain personal characteristics.[31] They had subjects listen to question-and-answer sessions in which the interviewer probed for evidence of either extroverted behavior (*e.g.*, "What do you do when you want to liven things up at a party?") or introverted behavior (*e.g.*, "Have you ever felt left out of some social group?"). One-third of the subjects heard only the questions, one-third heard only the answers, and one-third heard both sides of the interview. When subjects heard only the questions, they inferred that the respondent had the traits sought by the interviewer (*i.e.*, they assumed that the interviewer knew enough to ask extroverts about parties and introverts about difficult social situations). Suggestive questions thus serve as proof by conjecture.

In the context of a trial, of course, jurors hear not only the questions asked but the answers they elicit. It stands to reason that under the circumstances, conjectural evidence may be buried under the weight of the witness's testimony. Yet those subjects in the Swann study who—like jurors—heard both sides of the interview, were also misled. Consider the implications. The respondents in these experimental interviews did not actually possess the implied traits, so it seems odd that their answers did not override the effects of the interviewers' questions. In fact, however, the result makes sense. Limited to answering specific questions, respondents provided evidence to confirm the interviewers' conjecture. Subjects who heard the full interview were thus left with false impressions shaped by the questions. As Swann and his colleagues put it, "once respondents' answers 'let the cat out of the bag,' observers saw no reason to concern themselves with how the bag was opened."[32]

In light of these provocative findings, it is important to examine the effects of presumptuous cross-examination questions in legal proceedings in which jurors have the benefit of knowing the context of the questions (*e.g.*, the adversarial relationship between the cross-examiner and witness) and hearing the responses they evoke (*e.g.*, the witness's admission or vehement denial of the implication, or an objection from the witness's attorney).

In a recent study, 105 mock jurors were randomly assigned to one of seven groups.[33] All subjects read a transcript of a rape trial in which the defense argued that the victim was mistaken in her identification. Some subjects read a version of the case in which the cross-examiner asked a presumptuous derogatory question of the victim (*i.e.*, "Isn't it true that you have accused men of rape before?" followed by "Isn't it true that, four years ago, you called the police claiming that you had been raped?"); others read a version in which such ques-

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31. Swann, Giuliano & Wegner, *Where Leading Questions Can Lead: The Power of Conjecture in Social Interaction*, 42 J. PERSONALITY & SOC. PSYCHOLOGY 1025, 1034 (1982); *see also* Wegner, Wenclaff, Kerker & Beattie, *Incrimination Through Innuendo: Can Media Questions Become Public Answers?*, 40 J. PERSONALITY & SOC. PSYCHOLOGY 822, 830-32 (1981).

32. Swann, Giuliano & Wegner, *supra* note 31, at 1033. This effect is so powerful that it even influences the self-perceptions of the respondents themselves. After being interviewed, they took personality tests in which they were asked to describe themselves on various dimensions. Those who had answered questions about introverted or extroverted behaviors later rated themselves as such on the questionnaires.

33. Kassin, Williams & Saunders, *Dirty Tricks of Cross Examination: The Influence of Conjectural Evidence on the Jury*, 14 LAW AND HUMAN BEHAVIOR 373 (1990).

tions were asked of an expert for the defense (*i.e.*, "Isn't it true that your work is poorly regarded by your colleagues?" followed by "Hasn't your work been sharply criticized in the past?"). Within each version, the cross-examiner's questions were met with one of three reactions: an admission ("yes," "yes it is [has]"), a flat denial ("no,""no it isn't [hasn't]"), or an objection by the witness's attorney, after which the question was withdrawn before the witness had a chance to respond. An additional group of subjects read a transcript that did not contain any presumptuous questions.

Our results provided strong but qualified support for the hypothesis that negative presumptuous questions would diminish a witness's credibility. When the recipient of the question was the victim, the question did not significantly diminish her credibility. In fact, except when the question elicited an admission, female subjects—who are generally less sympathetic to the defense in this case than males—disparaged the defense lawyer who conducted the cross-examination. When the recipient of the presumptuous question was an expert, however, the technique of cross-examination by innuendo proved highly effective. When the expert's professional reputation was called into question—even though the charge was not corroborated by other evidence—subjects lowered their ratings of his credibility as a witness (*i.e.*, he was perceived as less competent, believable, and persuasive). Indeed, among female subjects, subjective estimates of guilt were elevated in all the innuendo groups, a result that reflects the diminished impact of the defense expert. These effects were obtained regardless of whether the presumptuous question had elicited a denial, an objection, or an admission. It is particularly interesting that this effect was obtained even though many of our subjects reported that they did not actually *believe* the derogatory implications concerning the expert. In short, even when the expert denied the charge, even when his attorney objected to the question, and even though many subjects in both situations did not accept as true the cross-examiner's presumption, the witness became "damaged goods" as soon as the reputation question was raised.

Why were our mock jurors so influenced by uncorroborated presumptions? There are at least two possible explanations. First, research in communication suggests that when people hear a speaker offer a premise in conversation, they naturally assume that he or she has an evidentiary basis for that premise.[34] Within the context of a trial, it is conceivable that jurors—naive about the dirty tricks of cross-examination—adhere to a similar implicit rule. In other words, jurors may assume that a lawyer who implies something about an expert's reputation must have information to support that premise, and treat it though it were a foregone conclusion. A second possible reason for the impact of presumptuous questions is that after all the evidence in a case has been presented, jurors may be unable to separate in memory the information communicated within the questions from those contained within the answers. Studies indicate

34. Grice, *Logic in Conversation*, 3 SYNTAX AND SEMANTICS 41, 44 (1975); Hopper, *The Taken-For-Granted*, 7 HUMAN COMMUNICATION RESEARCH 195, 198 (1981).

that people often remember the contents of a message but forget the source,[35] and that people often cannot discriminate among the possible sources of their current knowledge.[36] This kind of confusion is particularly likely to occur when the different sources of information are distant in time and equally plausible—as when jurors must recall after days, weeks, or months of testimony, whether a particular belief was derived from a lawyer's questions or a witness's answers.

From a practical standpoint, this study suggests that the use of presumptuous questions is a dirty trick that can be used to distort juror evaluations of witness credibility. As cross-examiners regularly employ such tactics, judges should be aware of the dangers and make a serious effort to control them. According to Rule 3.4(e) of the American Bar Association 1983 Rules of Professional Conduct, counsel "shall not allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence." In practice, however, many judges demand only a "good faith belief" in the truthfulness of the assertions contained in cross-examination questions.[37]

Two approaches can be taken to the problem. Since witnesses have an opportunity to deny false assertions, and since lawyers have an opportunity to object or "set the record straight" on redirect examination, one approach is to allow cross-examiners a good deal of latitude, and trust the self-corrective mechanisms already in place. Our study suggests, however, that both a witness's denials and an attorney's objections may fall on deaf ears. In the case of our expert, subjects lowered their ratings of his credibility even when he flatly denied the charge and even when his attorney won a favorable ruling on an objection. In fact, these strategies may well backfire. People are suspicious of others who are forced to proclaim their innocence too vociferously.[38] Likewise, research indicates instructions to disregard objectionable material are often ineffective, perhaps even counterproductive.[39]

Rather than taking a hands-off policy, our results lead me to believe that judges should intervene to control presumptuous leading questions. As a matter of judicial discretion in trial management, judges may admonish counsel who

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35. Kelman & Hovland, *"Reinstatement" of the Communicator in Delayed Measurement of Opinion Change*, 48 J. ABNORMAL & SOC. PSYCHOLOGY 327, 332-35 (1953); Pratkanis, Greenwald, Leippe & Baumgardner, *In Search of Reliable Persuasion Effects: III. The Sleeper Effect is Dead. Long Live the Sleeper Effect*, 54 J. PERSONALITY & SOC. PSYCHOLOGY 203, 205 (1988).

36. Johnson, *Discrimination the Origin of Information*, DELUSIONAL BELIEFS: INTERDISCIPLINARY PERSPECTIVES (Oltmanns & Maher eds. 1987); Johnson & Raye, *Reality Monitoring*, 88 PSYCHOLOGICAL REV. 67, 82 (1981).

37. U.S. v. Brown, 519 F.2d 1368 (6th Cir. 1975).

38. Shaffer, *The Defendant's Testimony*, THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE (Kassin & Wrightman eds. 1985); Yandell, *Those Who Protest Too Much are Seen as Guilty*, 5 PERSONALITY & SOC. PSYCHOLOGY BULL. 44, 47 (1979).

39. Carretta & Moreland, *The Direct and Indirect Effects of Inadmissible Evidence*, 13 J. APPLIED SOC. PSYCHOLOGY 291, 291-93 (1983); Sue, Smith & Caldwell, *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. APPLIED SOC. PSYCHOLOGY 345, 351-53 (1973); Wolf & Montgomery, *Effects of Inadmissible Evidence and Level of Judical Admonishment to Disregard on the Judgments of Mock Jurors*, 7 J. APPLIED SOC. PSYCHOLOGY 205, 216-18 (1977).

insert false premises into their questions.[40] Perhaps cautionary instructions to the jury would prove effective. If jurors are moved by conjecture because they follow the implicit rule of conversational logic that speakers have an evidentiary basis for their premises, then perhaps jurors should be forewarned about the use of dirty tricks. Recall that Swann's experiment had subjects listen to an interviewer ask questions that presumed the respondent to be introverted or extroverted. Hearing the questions, subjects inferred that the interviewee possessed the implied traits. When they were told, however, that the interviewer's questions were chosen at random (*i.e.*, without a reason), subjects did not make the inference. Thus, it may be similarly effective to caution jurors that the premises contained within questions are not evidence, and alert them to possible abuses.

To summarize, psychological research indicates that suggestive examination questions can mislead a jury in two ways. First, the questions themselves can misinform others through the power of conjecture. Second, suggestive questions can actually produce support for that conjecture by shaping the witness's testimony. If counsel wants to portray a witness as greedy, lazy, neurotic, introverted, or extraverted, he or she can do so by asking a series of biasing questions. Since a witness can tell a story only in response to specific inquiries, it is not impossible to get that witness to provide the necessary evidence. Redirect examination offers a possible safety valve, and to some extent its rehabilitative potential is self-evident. It is important to note, however, that first impressions often resist change despite subsequent contradictory information,[41] and that neither denial nor judicial admonishment is likely to have fully curative effects.

D. *Nonevidentiary Temptations*

As part of their factfinding role, jurors are instructed to recognize and disregard nonevidentiary sources of information—much of which is revealed within the courtroom (*e.g.*, voir dire questions, inadmissible testimony, opening statements, closing arguments). Can human decisionmakers maintain separate files in memory for evidence and nonevidence? And can they delete the latter from awareness upon instruction to do so?

In a series of experiments on "reality monitoring," Marcia Johnson and her colleagues have found that people are often unable to recall the sources of their

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40. In some cases, the courts have even sustained the right of an opposing party to call a cross-examiner to the witness stand to inquire into the "good faith basis" for a specific line of questions. *See* United States v. Cardarella, 570 F.2d 264, 268 (8th Cir. 1978); United States v. Pugliese, 153 F.2d 497, 498-99 (2d Cir. 1945).

41. *See, e.g.*, Asch, *Forming Impressions of Personality*, 41 J. ABNORMAL & SOC. PSYCHOLOGY 258, 288-90 (1946); Darley & Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOLOGY 20, 21-22 (1983); Greenwald, Pratkanis, Leippe & Baumgardner, *Under What Conditions Does Theory Obstruct Research Progress?*, 93 PSYCHOLOGICAL REV. 216, 227 (1986); Hamilton & Zanna, *Context Effects in Impression Formation: Changes in Connotative Meaning*, 29 J. PERSONALITY & SOC. PSYCHOLOGY 649, 652-54 (1974); Hayden & Mischel, *Maintaining Trait Consistency in the Resolution of Behavioral Inconsistency: The Wolf in Sheep's Clothing?*, 44 J. PERSONALITY 109, 129-31 (1976); E. JONES & G. GOETHALS, ORDER EFFECTS IN IMPRESSION FORMATION: ATTRIBUTION CONTEXT AND THE NATURE OF THE ENTITY 42-43 (1971); Kruglanski & Freund, *The Freezing and Unfreezing of Lay Inferences: Effects on Impressional Primacy, Ethnic Stereotyping, and Numerical Anchoring*, 19 J. EXPERIMENTAL SOC. PSYCHOLOGY 448, 461-65 (1983); Lord, Ross & Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOLOGY 2098, 2108 (1979).

knowledge.[42] Under certain circumstances people remember the *content* of a message, while forgetting the *source*. People are especially vulnerable to confusion when the possible sources of information are equally plausible—as when jurors must recall after a trial presentation whether their beliefs are based on what was said by the lawyers or witnesses, or whether they are the product of their own self-generated inferences. In the end, it means that jurors may erroneously attribute their own versions of reality, or counsel's version, to reality itself.

Research on the effects of opening statements illustrates the possible consequences of source confusion in the courtroom. In a series of mock jury experiments, Lawrence Wrightsman and others consistently found that strong opening statements are persuasive—even when they are not subsequently borne out by the evidence.[43] In one study, for example, subjects read one of three versions of an auto theft trial. In one version, defense counsel promised in his opening statement that he would provide evidence of an alibi, evidence that was never forthcoming. In contrast to subjects to whom the claim was never made, those who received the empty promise were more likely to vote for the defendant's acquittal. The strategy failed only in the third version of the trial, where the prosecutor reminded the jury in his closing argument of the discrepancy between what was promised and what was proved.[44] Absent a reminder, jurors may simply lack the necessary awareness of the sources of their trial beliefs.

Additional problems arise when jurors are exposed to inadmissible testimony, prompted by an attorney's question and subsequently stricken from the record. It should come as no surprise that jurors are often influenced by this leakage of nonevidentiary information. In one study, for example, mock jurors read a transcript of an armed robbery and murder trial. When the only available evidence was weak and circumstantial, not a single juror voted guilty. In a second version of the case that also contained a recording of a suspicious telephone conversation between the defendant and a bookmaker, and in which the judge ruled the tape admissible, the conviction rate increased to twenty-six percent. In a third version of the case in which the judge ruled the wiretapped conversation *in*admissible and admonished to disregard the tape, the conviction rate increased even further, to thirty-five percent.[45] Additional research has shown that when the judge embellishes his or her ruling by admonishing jurors at length, they become even more likely to use the forbidden information.[46]

Judicial admonishment may well backfire for a variety of reasons. First, it draws an unusual amount of attention to the information in controversy, increasing its salience relative to the evidence. Indeed, the psychology of instruc-

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42. *See, e.g.*, Johnson, Bransford & Solomon, *Memory for Tacit Implications of Sentences*, 98 J. EXPERIMENTAL PSYCHOLOGY 203, 204 (1973); Johnson & Raye, *supra* note 36, at 81-82.

43. Pyszczynski & Wrightsman, *The Effects of Opening Statements on Mock Jurors' Verdicts in a Simulated Criminal Trial*, 11 J. APPLIED SOC. PSYCHOLOGY 301, 309-10 (1981); Wells, Wrightsman & Meine, *The Timing of the Defense Opening Statement: Don't Wait Until the Evidence is In*, 15 J. APPLIED SOC. PSYCHOLOGY 758, 769 (1985).

44. Pyszczynski, Greenberg, Mack & Wrightsman, *Opening Statements in a Jury Trial: The Effect of Promising More Than the Evidence Can Show*, 11 J. APPLIED SOC. PSYCHOLOGY 434, 442 (1981).

45. Sue, Smith & Caldwell, *supra* note 39, at 350-51; *see also* Caretta & Moreland, *supra* note 39, at 305-06.

46. Wolf & Montgomery, *supra* note 39, at 216.

tions-to-disregard parallels recent studies on the paradoxical effects of thought suppression. For example, Daniel Wegner and his colleagues found that when people were told to actively suppress thoughts of a white bear, that novel image intruded upon consciousness with remarkable frequency.[47] A second problem is that instructions to disregard are a form of censorship, a restriction on the juror's decisionmaking freedom. Again, research in other contexts indicates consistently that people react against prohibitions of this sort in order to assert their right to consider all possible information.[48] A third reason why instructions-to-disregard may be counterproductive is that jurors do not share the law's "due process" model of what constitutes a fair trial, the assumption that a verdict is just if procedural fairness is achieved. Ask jurors what they seek, and most will cite outcome accuracy as the main objective (*i.e.*, "to make the *right* decision"). Thus, it is notable that jurors seem most likely to succumb to the temptation to use inadmissible evidence when that evidence exonerates the criminal defendant.[49]

Sometimes inadmissible evidence is properly introduced via the "limited admissibility rule" which permits the presentation of evidence for one purpose, but not another.[50] In such cases, the judge admits the evidence, restricts its proper scope, and instructs the jury accordingly (*e.g.*, when a defendant's criminal record is admitted for its bearing on the issue of credibility, not guilt). Can jurors compartmentalize evidence in this manner, using it to draw one inference, but not another? This rule is one of the paradoxes of evidence law, and is viewed by many as a lesson in futility. One survey revealed that ninety-eight percent of the lawyers and forty-three percent of the judges questioned believed jurors could not comply with this instruction.[51] They are probably right. Mock jurors who learn that a defendant has a criminal record and are limited in their use of that evidence are more likely to vote for conviction even though their judgments of the defendant's credibility are unaffected by that information.[52] Likewise, mock juries spend a good deal of time discussing a defendant's record—not for what it implies about credibility, but for what it suggests about criminal predispositions.[53]

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47. Wegner, Schneider, Carter & White, *Paradoxical Effects of Thought Suppression*, 53 J. PERSONALITY & SOC. PSYCHOLOGY 5, 8-9 (1987).

48. This explanation is based on Brehm's 1966 theory of psychological reactance. *See* S. BREHM & J. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL 3-7 (1981); *see also* Worchel, Arnold & Baker, *The Effect of Censorship on Attitude Change: The Influence of Censor and Communicator Characteristics*, 5 J. APPLIED SOC. PSYCHOLOGY 227, 237 (1975) (for relevant empirical support).

49. Thompson, Fong & Rosenhan, *Inadmissible Evidence and Juror Verdicts*, 40 J. PERSONALITY & SOC. PSYCHOLOGY 453, 460 (1981).

50. FED. R. EVID. 404(a)(3).

51. Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant with a Criminal Record*, 4 COLUM. J. L. & SOC. PROBS. 215, 218 (1968).

52. Wissler & Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 L. & HUM. BEHAV. 37, 47 (1985).

53. *See* Shaffer, *supra* note 38, at 145. The inherent prejudice of this rule is indicated by the finding that mock jurors told of a defendant's criminal record view the remaining evidence as more damaging than those who are uninformed. *See* Hans & Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L.Q. 235, 244-46 (1975).

E. *Voices from an Empty Chair*

In one trial, a defendant accused of armed robbery claims he was drinking in a bar at the time, but does not bring in alibi witnesses who were supposed to have been with him. In another trial, a party involved in a traffic accident fails to call to the witness stand a friend or relative who was a passenger during the collision. Cases such as these pose a dilemma: When a prospective favorable witness does not take the stand, should opposing counsel be permitted in closing argument to cite that witness's absence as proof of his or her adverse testimony? Should the judge invite jurors to draw negative inferences from that missing witness?

The courts are divided on how they manage this situation. Nearly a century ago, in *Graves v. United States*, the United States Supreme Court introduced what has come to be known as the missing witness rule, or empty chair doctrine. The rule states that "if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable."[54] In operational terms, this rule enables lawyers to comment on a witness's absence in closing arguments and judges to suggest possible adverse inferences to the jury. The reasons for this doctrine are straightforward.[55] The courts assume that litigants who fail to call knowledgeable witnesses are concealing evidence and should be pressured to come forward with that evidence. In addition, it is argued that jurors on their own will draw adverse inferences from the absence of an expected witness. Stephen Saltzburg, for example, suggested that once jurors are presented with a theory about a case, they naturally come to expect certain kinds of supporting proof and are likely to make adverse inferences about any party that fails to satisfy these expectations. Carrying this analysis one step further, Saltzburg argued that judges should take juror expectations and inferences into account before ruling to exclude evidence considered relevant but prejudicial.[56]

The empty chair doctrine has been criticized on at least three grounds. First, it is said to be unfair to draw adverse inferences from missing evidence because there are many other possible reasons for a witness's failure to appear in court.[57] Second, constitutional issues arise in cases where an expected witness does not testify on behalf of a criminal defendant, whose own silence is protected by the fifth amendment.[58] A third criticism of the empty chair rule is

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54. Graves v. United States, 150 U.S. 118, 121 (1893).

55. E. CLEARY, MCCORMICK ON EVIDENCE § 272 (3d ed. 1984); J. CHADBOURN, WIGMORE'S EVIDENCE, § 286 (3d ed. 1970).

56. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CALIF. L. REV. 1011, 1012 (1978).

57. For example, a litigant may choose to protect family members and friends from the stress of cross-examination, or may fear that a witness will lack credibility. *See* Stier, *Revisiting the Missing Witness Inference: Quieting the Loud Voice from the Empty Chair*, 44 MD. L. REV. 137, 144-45 (1985).

58. In Griffin v. California, the United States Supreme Court ruled that neither judges nor prosecuting attorneys may comment on a defendant's failure to take the witness stand. 380 U.S. 609, 615 (1965). Indeed, judges may instruct jurors *not* to draw adverse inferences from a defendant's silence. Lakeside v. Oregon, 435 U.S. 333, 340-41 (1978). Questions are thus raised about whether the fifth amendment is compromised by comments concerning absent witnesses other than the defendant. *See* McDonald, *Drawing an Inference from the Failure to*

that it sends a confusing mixed signal to jurors about their role as fact finders. Although jurors are admonished time and again to base their judgments only on evidence produced in court, the missing witness instruction may encourage them to speculate on other matters not in evidence.[59]

On their own, do jurors make adverse inferences concerning absent witnesses? What are the effects of empty chair comments? Indirectly, psychological research suggests an "it depends" answer to these empirical questions. When a prospective witness is central to a case and, hence, conspicuously absent, juries are likely to speculate, even without prompting. This suggestion is based on studies indicating that people are biased against criminal defendants who remain silent, even when they are specifically admonished not to draw negative inferences.[60] In contrast, when a witness is not clearly essential to a case, juries are not likely to be influenced by his or her absence. This suggestion is based on studies on the "feature-positive effect," the finding that humans are relatively insensitive to events that do *not* occur.[61]

To examine more directly the effects of missing witnesses on legal decision-making, my students and I conducted the following mock jury study.[62] Upon arrival in a mock courtroom, fifty subjects—participating in small groups—read one of four versions of an insanity murder trial in which either a central witness (the defendant's close friend) or a peripheral witness (a co-worker of the defendant) was absent,[63] and in which the judge and opposing counsel either did or did not suggest an adverse inference.[64] Opinions of the case were assessed both before and after subjects deliberated.

Produce a Knowledgeable Witness: Evidentiary and Constitutional Considerations, 61 CALIF. L. REV. 1422, 1423-26 (1973); *see also* Tanford, *An Introduction to Trial Law*, 51 MO. L. REV. 623, 680-81 (1986).

59. S. KASSIN & L. WRIGHTSMAN, *supra* note 5, at 113.

60. Shaffer & Case, *On the Decision Not to Testify in One's Own Behalf: Effects of Withheld Evidence, Defendant's Sexual Preferences, and Juror Dogmatism on Juridic Decisions*, 42 J. PERSONALITY & SOC. PSYCHOLOGY 335, 344 (1982).

61. Fazio, Sherman & Herr, *The Feature-Positive Effect in the Self-Perception Process: Does Not Doing Matter as Much as Doing?*, 42 J. PERSONALITY & SOC. PSYCHOLOGY 404, 409-10 (1982); Newman, Wolff & Hearst, *The Feature-Positive Effect in Adult Human Subjects*, 6 J. EXPERIMENTAL PSYCHOLOGY: HUM. LEARNING & MEMORY 630, 647-48 (1980).

62. Webster, King & Kassin, *Voices from an Empty Chair: The Missing Witness Inference and the Jury*, LAW AND HUMAN BEHAVIOR (in press).

63. *Id.* To establish juror expectations for a missing witness, defense counsel's opening statement included mention of the fact that the defendant had talked about his emotional difficulties to a close friend and to a co-worker. In the missing-central version of the case, the close friend did not testify. In the missing-peripheral version, the co-worker did not testify. All versions of the transcript thus contained the same information, varying only in the present and absent sources of that information.

64. In the *no-comment* condition, neither the prosecutor nor the judge made reference to the missing witness. In the *comment* condition, the prosecutor argued in closing, "I put it to you, ladies and gentlemen—where is Mr. Steven Marshall (John Mills)? Is it possible that Mr. Marshall (Mills) would not have corroborated the misinformed opinion of the psychiatrists? I think it is. Members of the jury, if your best friend (co-worker) were in this kind of trouble, wouldn't *you* want to be here to help him? I think, in weighing the evidence, you will come to the conclusion that I have." *Id.*

Also in the comment condition, the judge's charge to the jury included the following instruction, approved for use in federal courts: "If, according to appropriate procedures, the court is shown that a witness is available to one of the parties alone, and the anticipated testimony of the witness would elucidate some material issue, and the party who fails to produce the witness offers no explanation, then the factfinder may be permitted, but is not required, to infer that the testimony would have been unfavorable to the party who failed to call the witness." *See* I. DEVITT & C. BLACKMAR, FED. JURY PRAC. AND INSTRUCTIONS, § 17.19 (3d ed. 1977); *see also* FED. JUDICIAL

The results of this experiment were generally consistent with the predictions derived from other research. Three findings in particular are noteworthy. First, all subjects were aware of the witness's absence, but when asked if they needed additional information, far more subjects in the comment than no-comment condition expressed a need for testimony from that witness. Second, there was an effect on case-related opinions: among subjects who read the missing-central transcript, empty chair comments increased the likelihood of conviction and enhanced their evaluations of the prosecuting attorney. In the missing-peripheral condition, however, the same empty chair comments decreased the likelihood of conviction and diminished subjects' evaluations of the prosecuting attorney. Third, subjects in the comment condition, after deliberating, were somewhat more likely than those in the no-comment condition to express a desire for testimony from the defendant (who did not testify). This latter result suggests the possibility that jurors who read the empty chair comments had discussed the defendant's failure to testify during their deliberations.

Is the missing witness inference "natural," an argument made by proponents of the empty chair doctrine? No, the inference is not as natural as it may seem. Subjects in the no-comment group knew that the prospective central or peripheral witness had not testified, but they did not hold the defendant responsible unless prompted to do so by the judge and opposing counsel. To be sure, all subjects recognized that the missing witness was absent, but only those in the comment condition were moved by his absence. Should empty chair comments, then, be permitted? Our study does not provide a clear answer to this second question. For trial attorneys, there are potential costs and benefits associated with empty chair comments, depending on the status of the witness in question. Lawyers who comment on a missing central witness may draw the jury's attention to a gap in the opponent's case, reap the benefits of the inferences likely to be drawn, and elicit the perception that they themselves are competent. On the other hand, attorneys who drag a missing peripheral witness into evidence risk alienating the jury by making what appears to be an implausible argument, and eliciting the perception that they themselves are desperate, if not incompetent. Our results thus support the conclusion that the empty chair doctrine cannot easily be used for unfair strategic purposes, without regard for the extent to which the jury already expects testimony from that witness.

II. THE JURY DELIBERATION PROCESS

It is often said that the distinctive power of the jury is that it functions as a group. Indeed, although the jury meets in complete privacy, the courts have articulated a clear vision of how juries should deliberate to a verdict. Basically, there are three components to this ideal.

The first component is one of independence and equality. No juror's vote counts for more than any other juror's vote. A twelve-person jury should thus consist of twelve independent and equal individuals, each contributing his or her

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CTR. COMM. TO STUDY CRIM. JURY INSTRUCTIONS, PATTERN CRIM. JURY INSTRUCTIONS 49 (1982) (for alternative language).

own personal opinion to the final outcome. Unlike other task-oriented groups, the jury's role is ideally structured to promote equal participation. The cardinal rule of jury decisionmaking is that verdicts be based only on the evidence introduced in open court. By limiting the task as such, jurors are discouraged from basing their arguments on private or outside sources of knowledge. The courts try to foster this ideal in a number of ways. For example, jurors are told to refrain from discussing the trial until they deliberate, thus ensuring that each juror develops his or her own unique perspective on the case, uncontaminated by others' views. In addition, the courts often exclude from service people who are expected to exert a disproportionate amount of influence over other jurors (such as lawyers or others who have expertise in trial-relevant matters).

The second component of an ideal deliberation is an openness to informational influence. Inside the jury room, members have a duty to share information, exchange points of view, and debate the evidence. This deliberation requirement means that jurors should maintain an open mind and withhold their judgment until "an impartial consideration of the evidence with his fellow jurors."[65] It also means that consensus should be achieved through rational, persuasive argument. As the Supreme Court put it almost a century ago, "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves . . . . It cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself."[66]

The third ideal of deliberation follows from the second. Although juries should strive for a consensus of opinion, that goal should not be achieved through heavy-handed social pressure. Obviously, those who dissent from the majority should not be beaten, bullied, or harangued into surrendering their convictions for the purpose of returning a verdict. The reason is simple: if jurors comply with the majority to avoid rejection or terminate an unpleasant experience, then their final vote might not reflect their true beliefs. In the Supreme Court's words, "the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows. . . ."[67]

As in other decisionmaking groups, juries reach a verdict through two processes—informational and normative.[68] Through informational social influence, individuals conform because they are genuinely persuaded by majority opinion; through normative influence, individuals comply in order to avoid the

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65. American Bar Association Project on Minimum Standards for Criminal Justice (1968), Standards Relating to Trial by Jury, Section 5.4. Open-mindedness is such an important aspect of deliberation that if a juror dies before a verdict is announced, the jury cannot return a verdict even if all the remaining jurors swear that the deceased had agreed with their decision. The reasoning behind this rule is that "[t]he jurors individually and collectively have the right to change their minds prior to the reception of the verdict . . . ." E. DEVITT & C. BLACKMAR, FED. JURY PRACT. AND INSTRUCTIONS, § 5.23 (3d ed. 1977).

66. Allen v. United States, 164 U.S. 492, 501-02 (1896).

67. *Id.* at 501.

68. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 PSYCHOLOGICAL MONOGRAPHS, Whole No. 416 (1956); Deutsch & Gerard, *A Study of Normative and Informational Social Influence Upon Individual Judgment*, 51 J. ABNORMAL & SOC. PSYCHOLOGY 629, 629 (1955).

unpleasant consequences of social pressure. Indeed, groups often reject, ridicule, and punish individuals who frustrate a common goal by taking a deviant position.[69] The importance of both processes has been well documented in recent conformity research,[70] and in jury research as well.[71] As Kalven and Zeisel noted in *The American Jury*, the deliberation process "is an interesting combination of rational persuasion, sheer social pressure, and the psychological mechanism by which individual perceptions undergo change when exposed to group discussion."[72]

Although jury verdicts should follow a vigorous exchange of information and a minimum of normative pressure, the delicate balance between these competing forces can be altered by various aspects of a jury's task.[73] For example, normative influences are heightened in groups that decide on questions of values rather than facts,[74] and in groups that take frequent public ballots.[75] In addition, recent research implicates two procedural factors that may compromise the integrity of jury deliberations: (1) the dynamite charge, and (2) the acceptance of nonunanimous verdicts.

A. *The Dynamite Charge*

Recently, I received a phone call from a criminal lawyer whose client had been convicted on six counts of tax fraud. After two days of testimony, arguments, and instructions, the twelve-person jury spent three days deliberating. On the second day of deliberation, the jury informed the judge that it was at an impasse on some counts. The jurors were reconvened, but then on the third day said they were hopelessly deadlocked on all counts, with no verdict in sight. At that point, the judge issued a special instruction, one that is designed to prod hung juries toward a verdict. Twenty minutes later, as if a spell had been cast, the jury reached unanimous guilty verdicts on all counts.

The instruction that preceded the jury's decision was modeled after the Allen charge, first used in Massachusetts,[76] and approved by the United States

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69. *See, e.g.*, Schachter, *Deviation, Rejection, and Communication*, 46 J. ABNORMAL & SOC. PSYCHOLOGY 190 (1951); For a review see Levine, *Reaction to Opinion Deviance in Small Groups*, PSYCHOLOGY OF GROUP INFLUENCE (P. Paulus ed. 1980).

70. *See, e.g.*, Campbell & Fairey, *Informational and Normative Routes to Conformity: The Effect of Faction Size as a Function of Norm Extremity and Attention to the Stimulus*, 57 J. PERSONALITY & SOC. PSYCHOLOGY 457, 458 (1989).

71. *See, e.g.*, Kaplan & Miller, *Group Discussion and Judgment*, BASIC GROUP PROCESSES 65 (P. Paulus ed. 1983); Kaplan & Miller, *Group Decision-Making and Normative Versus Information Influence: Effects of Type of Issue and Assigned Decision Rule*, 53 J. PERSONALITY & SOC. PSYCHOLOGY 306 (1987); Stasser, Kerr & Bray, *The Social Psychology of Jury Deliberations*, PSYCHOLOGY OF THE COURTROOM 221 (Kerr & Bray eds. 1982).

72. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 489 (1966).

73. There are important reasons to protect individual jurors from normative influences that elicit mere public compliance. First, justice is undermined when a jury renders a verdict not supported even by its membership (*e.g.*, criminal defendants should not be convicted by juries internally plagued by a reasonable doubt). Second, unanimous votes produced by normative influences may undermine perceptions of justice among those who serve on juries.

74. Kaplan & Miller, *supra* note 71, at 311.

75. Hawkins, *Interaction Rates of Jurors Aligned in Factions*, 27 AM. SOC. REV. 689 (1962) (public vote in jury deliberation).

76. Commonwealth v. Tuey, 62 Mass. 1 (1851).

Supreme Court in *Allen v. United States*.[77] Used to blast deadlocked juries into a verdict, this supplemental instruction is believed to be so effective that it is commonly known as the "dynamite charge."[78] For judges confronted with the prospect of a hung jury, this instruction can be used to avert a mistrial by imploring jurors to reexamine their own views and to seriously consider each other's arguments with a disposition to be convinced. In addition, it may state that "if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression on the minds of so many men, equally honest, equally intelligent with himself."[79]

Trial anecdotes suggest that the dynamite charge is effective. Those who believe the effect is desirable argue that it encourages all jurors to reevaluate their positions and that, after all, those who are in the voting minority are typically obstinate holdouts who should "properly be warned against stubbornness and self-assertion."[80] Opponents, however, fear that legitimate dissenters, "struggling to maintain their position in a protracted debate in the jury room, are led into the courtroom and, before their peers, specifically requested by the judge to reconsider their position.[81] The charge places the sanction of the court behind the views of the majority, whatever they may be. . . ."[82]

The dynamite charge has its share of proponents and critics. In 1968, the American Bar Association opposed this instruction on the grounds that it coerces the deadlocked jury into reaching a verdict and places inordinate amounts of pressure on those in the minority.[83] The dynamite charge has been prohibited or restricted in certain state and federal courts.[84] In 1988, however, the United States Supreme Court ruled that the dynamite charge is not necessarily coercive, and reaffirmed its use on a routine basis.[85]

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77. 164 U.S. 492 (1896).

78. It has also been called the "shotgun" instruction, the "third degree" instruction, the "nitroglycerin" charge, the "hammer" instruction, and the "hanging" instruction. *See* Marcus, *The* Allen *Instruction in Criminal Cases: Is the Dynamite Charge About to be Permanently Defused?*, 43 MO. L. REV. 613, 615 (1978).

79. *Allen*, 164 U.S. at 501. The full text of the charge reads as follows:

> That in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

Id.

80. People v. Randall, 9 N.Y.2d 413, 214 N.Y.S.2d 417, 174 N.E.2d 507 (1961) (quoting People v. Faber, 199 N.Y. 256, 260-61).

81. *Id.* at 850, 139 Cal. Rptr. at 869, 566 P.2d at 1005 (quoting United States v. Bailey, 468 F.2d 652, 662 (5th Cir. 1972)).

82. People v. Gainer, 19 Cal.3d 835, 850, 139 Cal. Rptr. 861, 869, 566 P.2d 997, 1005 (1977).

83. American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury, Standards 5.4 (1968).

84. *See* Jensen, *After* Lowenfield: *The* Allen *Charge in the Ninth Circuit*, 19 GOLDEN GATE U.L. REV. 75, 85 (1989); Marcus, *supra* note 78, at 617; Notes and Comments, *On Instructing Deadlocked Juries*, 78 YALE L.J. 100, 103-06 (1968).

85. Lowenfield v. Phelps, 484 U.S. 231 (1988).

Although the dynamite charge has stirred controversy for many years, and although the Supreme Court has now upheld its use, until recently no empirical studies had examined its impact on the jury's deliberation process. Thus, my colleagues and I sought to test the hypothesis that the dynamite charge upsets the delicate balance of social influence forces, causing those in the majority to exert increasing amounts of normative rather than informational pressure, and causing those in the minority to change their votes.[86]

In order to test this hypothesis in a controlled setting, we contrived an artificial experimental situation in which lone subjects "deliberated" by voting and passing notes. Overall, seventy-two individual subjects read about a criminal tax case, thinking they would participate on a mock jury. In fact, subjects were taken to a cubicle and told they would communicate with three others in different rooms by passing notes. These so-called deliberations were structured by discrete rounds. After reading the case summary, subjects wrote down a verdict and a brief explanation. They signaled the experimenter over an intercom. The experimenter collected the subject's note, supposedly collected other subject's notes, photocopied them, and distributed the copies to each subject. After reading the other notes, subjects began a second round of deliberation—voting, writing an explanation, signaling the experimenter and receiving written feedback from three fictitious peers. Subjects were instructed that this procedure would be reiterated until the group reached unanimity. In fact, unless subjects changed their votes, the session was terminated after seven rounds. At that point, a questionnaire was administered and subjects were debriefed.

Six sets of notes—three guilty, three not guilty—were written and photocopied.[87] All subjects received three notes at a time. Those assigned to the majority received two randomly selected sets of notes that agreed with their guilty or not guilty verdicts, and one set that did not. In contrast, subjects assigned to the minority received three randomly selected sets of notes that all disagreed with their verdicts. By the end of the first round, subjects thus found themselves in either the majority or minority faction of a three-to-one split. Unless subjects changed their vote, these divisions persisted.[88] After the third round, half the subjects were reminded that since verdicts had to be unanimous, they would continue to "deliberate."[89] For the other half, the experimenter—acting as judge—delivered an instruction patterned after the *Allen* charge.

Three results were consistent with the hypothesis that the dynamite charge is effective because of normative pressure on those in the voting minority. First, among subjects caught in a deadlocked jury (*i.e.*, who remained committed to their initial votes after the third round), those in the minority changed their verdicts more often than those in the majority after receiving the dynamite charge, but not in the no-instruction control group. Second, minority subjects

86. Kassin, Smith & Tulloch, *The Dynamite Charge: Effects on the Perceptions and Deliberation Behavior of Mock Jurors.* 14 LAW AND HUMAN BEHAVIOR 537 (1990).

87. Each set consisted of six notes written in the same handwriting.

88. As one might expect, several members of the minority capitulated; in these instances, the session was terminated and questionnaires administered.

89. This no-instruction control procedure was designed to resemble what often happens when jurors are deadlocked and the judge directs them to return for further discussion.

who heard the dynamite charge reported feeling heightened pressure from the judge—more than in the majority and minority-no-instruction groups.[90] Third, compared to all other subjects, those in the majority who received the dynamite charge exhibited in their notes diminishing amounts of informational influence strategies (*e.g.*, citing facts or laws relevant to the case), coupled with a significant increase in normative social pressure (*e.g.*, derogating those who disagreed, refusing to yield) immediately following the judge's instruction. Clearly, the dynamite charge tipped in an undesirable direction the balance of forces operating on our subjects, subjectively empowering the voting majority relative to the minority.

Taken as a whole, our results call into question the use of the dynamite charge as a means of eliciting verdicts from deadlocked juries. This study should be considered tentative, however, with regard to its generalizability to real trials. To systematically test the impact of the dynamite charge on the votes, perceptions, and behaviors of individual jurors, we contrived an artificial situation in which lone subjects "deliberated" by passing notes.[91] It remains to be seen whether the same results would emerge within live, interacting groups of jurors. It also remains to be seen whether alternative forms of instruction yield better results (i.e., verdicts from deadlocked juries through informational rather than normative influence).[92]

B. *Less-Than-Unanimous-Verdicts*

The problem with the dynamite charge is that it may produce verdicts in which the jury's unanimity is more apparent than real. However, even the appearance of unanimity is often not necessary. In a pair of 1972 decisions, the United States Supreme Court ruled that states may allow juries to return verdicts without having to secure agreement from all members.[93] Finding neither a legal nor historical basis for the unanimity tradition, the Court concluded that, as a practical matter, juries function similarly under unanimous and

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90. It is interesting that even though all subjects received the same deliberation notes, those in the minority-dynamite group imagined they were under greater pressure from the other jurors.

91. Further research is clearly needed. One approach would be to conduct field experiments on real cases in which deadlocked juries are randomly assigned to receive either the *Allen* charge or a control instruction. Because random assignment of real juries is not feasible, however, a more realistic approach is to conduct a large-scale laboratory study involving interacting mock jurors.

92. The American Bar Association, for example, offered an alternative charge, one which emphasizes jurors' duty to consult with one another without singling out those in the minority. The instruction reads:

> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

See American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury, Standard 5.4 (1968).

93. Apodaca v. Oregon, 406 U.S. 404 (1972) (the Court upheld convictions by votes of 11 to 1 and 10 to 2); Johnson v. Louisiana, 406 U.S. 356 (1972). Current practices are varied. The federal courts still require unanimous verdicts, but a handful of states permit non-unamimous verdicts in criminal trials, and over 30 states allow these verdicts in civil actions.

nonunanimous decision rules. Writing for the *Johnson* majority, Justice White argued that majority jurors would maintain an open mind and continue to deliberate in good faith even after the requisite majority is reached.[94] In dissent, Justice Douglas argued that once a requisite majority is reached, majority jurors will become closed-minded, and vigorous debate would give way to "polite and academic conversation."[95]

Are unanimous and nonunanimous juries equivalent in the extent to which they achieve the ideals of deliberation? Several studies have addressed the question, and the results converge on the same answer: the differences are substantial. In one study, Charlan Nemeth had several hundred students at the University of Virginia read about a murder trial and indicate whether they believed the defendant to be guilty or not guilty.[96] Three weeks later, these students participated in six-person mock juries constructed to split four to two in their initial vote, favoring either conviction or acquittal. The groups were given two hours to reach a decision. Half were instructed to return a unanimous verdict, the other half needed only a two-thirds majority. Compared to those driven toward unanimity, majority-rule juries took less time to settle on a decision (many of these groups, in fact, concluded their deliberations without a single change in vote). When subjects were given an opportunity to evaluate the quality of their deliberations, those who had participated in majority juries were less satisfied, less certain of their verdicts, and less influenced by others' arguments.

In a more extensive study, Reid Hastie and his colleagues recruited over 800 people from jury pools in Massachusetts.[97] After a brief voir dire, these subjects were randomly assigned to participate in sixty-nine twelve-person mock juries, all of whom watched a videotape of a reenacted murder trial. An approximately equal number of juries were instructed to reach a verdict by either a twelve to zero, a ten to two, or an eight to four margin. Based on objective analyses of the deliberations as well as jurors' own subjective reports, the results were striking. Compared to unanimous juries, those that deliberated under a more relaxed rule spent less time discussing the case and more time voting. After reaching their required quorum, these groups usually rejected the hold-

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94.

> We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict. On the contrary it is far more likely that a juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction.

Johnson, 406 U.S. at 361.

95.

> [N]onunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required either by Oregon or by Louisiana even though the dissident jurors might, if given the chance, be able to convince the majority. . . . It is said that there is no evidence that majority jurors will refuse to listen to dissenters whose votes are unneeded for conviction. Yet human experience teaches that polite and academic conversation is no substitute for the earnest and robust argument necessary to reach unanimity.

Id. at 388-89.

96. Nemeth, *Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules*, 7 J. APPLIED SOC. PSYCHOLOGY 38, 42-43 (1977).

97. R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY 45 (1983).

outs, terminated discussion, and returned a verdict within just a few minutes. Needless to say, those who participated in majority juries viewed their peers as relatively closed-minded, felt less informed about the case and less confident about the final verdict. Hastie and his colleagues also observed that many of the majority jurors were quite combative during their deliberations, as "larger factions in majority rule juries adopt a more forceful, bullying, persuasive style because their members realize that it is not necessary to respond to all opposition arguments when their goal is to achieve a faction size of only eight or ten members."[98]

C. *Summary: Policies that Compromise the Deliberation Process*

In nineteenth century England, juries that were unable to achieve unanimity "were locked up in a cart, without meat, drink, fire, or candle, and followed the judge from town to town. Only their verdict could secure their release."[99] American juries were similarly subverted. Judges used to urge deadlocked juries to resolve their disagreements through such coercive measures as the denial of food and drink, excessive deliberation hours, and the threat of confinement. Today, the strategies may differ, but the objective is the same. The dynamite charge and the relaxation of a unanimous verdict requirement are driven by a contempt for the hung jury and the costs incurred by a mistrial. Proponents of these policies seem to base their opinions on the assumption that a jury becomes deadlocked because of one obstinate holdout, the chronic anti-conformist. Opponents, on the other hand, base their views on the belief that juries are hung as a genuine response to close, difficult cases in which the evidence allows for well-reasoned disagreement and does not compel a particular verdict. To be sure, not all deadlocked juries are created equal, and anecdotes can be found to support either position. Kalven and Zeisel's research, however, suggests that hung juries occur in only about five percent of all criminal jury trials, and do so especially in close cases in which the minority consists of a group rather than one member—a finding that lends support to the latter, more rational image.[100]

Neither the dynamite charge nor suspension of the unanimity requirement have desirable effects on the quality of the jury's decisionmaking apparatus. Used to implore the deadlocked jury to return a verdict, the dynamite charge may well encourage members of the voting majority to exert increasing amounts of normative pressure without added informational influence, thus intimidating members of a voting minority into compliance. The net result, of course, is an illusion of unanimity. Even worse is the outright acceptance of nonunanimous verdicts. This policy weakens and inhibits dissenting jurors, breeds closed-mindedness, impairs the quality of discussion, and leaves many jurors unsatisfied with the final verdict. And yet, without a potent and vocal dissent based on legitimate differences of opinion, the jury is reduced to a mere collection of individuals, losing its strength as a vital decisionmaking group.

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98. *Id.* at 112.
99. Walker v. United States, 342 F.2d 22, 28 (5th Cir. 1965).
100. H. KALVEN & H. ZEISEL, *supra* note 72, at 453.

III. CONCLUSIONS

The American trial jury is a truly unique institution. In the words of Kalven and Zeisel, "[i]t recruits a group of twelve laymen, chosen at random from the widest population; it convenes them for the purpose of the particular trial; it entrusts them with great official powers of decision; it permits them to carry on deliberations in secret and to report their final judgment without giving reasons for it; and, after their momentary service to the state has been completed, it orders them to disband and return to private life."[101]

This article rests on a conviction that juries should not be evaluated by case studies, autobiographical accounts, and news stories, but by hard empirical research designed to answer concrete, behavioral questions. With that objective in mind, trial practices that influence the decisionmaking process were examined for their effects on both individual jurors and the jury as a group.

Jurors are expected to base their opinions on an accurate appraisal of evidence to the exclusion of nonevidentiary sources of information. Thus, trials are structured by an elaborate network of rules to focus jurors on the evidence, to facilitate their search for the truth, and to insulate them from various social influences. Research on how jurors assess the credibility of witnesses, and their ability or willingness to resist the lure of certain kinds of extraneous information, gives rise to the conclusion that there is much room for improvement. To begin with, jurors are supposed to distinguish among witnesses of varying credibility, an often difficult task. Yet that task is more complicated than is necessary. To be sure, the occasional intrusion into the trial record of inadmissible testimony and objectionable arguments is an inevitable fact of life in an adversarial system. But too often, American courts compound the problem by permitting counsel to (1) use surrogates to present deposition testimony for absentee witnesses, leaving the jury to disentangle the appearance and demeanor of the messenger from the message and its orignal source; (2) impart information through conjecture and innuendo, leaving jurors to assume the truth of uncorroborated matters and confuse in memory the sources of their knowledge; and (3) invite jurors to draw adverse inferences from missing witnesses, leading them to create evidence from the absence of evidence, and sending a confusing mixed signal concerning speculation and the boundaries of their fact-finding role.

Turning to the jury as a group, it is perhaps the greatest asset of the jury that a group of independent citizens, strangers to one another, are placed behind closed doors and directed to reach a common decision. Bringing a diversity of perspectives to bear on the task, these jurors share information, clash in their values and argue over competing interpretations. Remarkably, out of this conflict, ninety-five percent of all juries succeed in returning a verdict. Intolerant of lengthy deliberations and the five percent of juries that declare themselves hung, however, the courts have sanctioned procedures and structural changes in the jury that widen the gap between the ideals and realities of deliberation. One example is the *Allen* instruction, otherwise known as the dynamite charge. Used

101. H. KALVEN & H. ZEISEL, *supra* note 72, at 3.

to implore the deadlocked jury to return a verdict, research suggests it may tip in an undesirable direction the balance of informational and normative forces operating within the jury, further empowering the voting majority relative to the minority, and intimidating the latter into compliance. A second example is provided by the United States Supreme Court's decisions to uphold the right of states to relax the jury's unanimity requirement. Indeed, research clearly indicates that a less-than-unanimous decision rule weakens dissent, breeds closed-mindedness, impairs the quality of discussion, and leaves many jurors unsatisfied with the final verdict.

In light of recent research on human decisionmaking and behavior, consciousness should be raised in American courtrooms about common trial practices and procedures that lead individual jurors and the groups to which they belong to exhibit less-than-ideal performance. Prescriptions for how juries should function are clear. In reality, however, the American jury is too often handicapped in the pursuit of justice.